May 31, 2006

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
DAVID GEISEN	)	Docket No. IA-05-052
	)	
	)	ASLBP No.06-845-01-EA

NRC STAFF'S PETITION FOR INTERLOCUTORY REVIEW OF BOARD'S DENIAL OF MOTION TO HOLD THE PROCEEDING IN ABEYANCE AND FOR A STAY PENDING REVIEW

INTRODUCTION

Pursuant to 10 C.F.R. § 2.341(f)(2) and 2.342, the Staff of the Nuclear Regulatory Commission (Staff), at the request of the Department of Justice (DOJ), hereby requests that the Commission grant review of the decision of the Atomic Safety and Licensing Board (Board), LBP-06-13, denying the Staff's motion to hold the proceeding in abeyance (hereinafter Board Order). As discussed below, the Board erred in denying the motion. Accordingly, the Board Order denying the motion should be reversed, and the proceeding should be held in abeyance. In addition, the Staff hereby asks that the Commission stay the effectiveness of the Board Order pending decision on the petition for review.

BACKGROUND

Mr. David Geisen was previously employed as the Manager of Design Engineering at the Davis-Besse Nuclear Power Station (Davis-Besse) operated by FirstEnergy Nuclear Operating Company (FENOC). On January 4, 2006, the Staff issued to Mr. Geisen an Order Prohibiting Involvement in NRC-Licensed Activities.[1] The Order prohibits Mr. Geisen from any involvement in NRC-licensed activities for a period of five years effective immediately. The Order alleges that Mr. Geisen violated 10 C.F.R. § 50.5(a)(2) by deliberately submitting information that he knew

[1] *See* David Geisen; Order Prohibiting Involvement in NRC-Licensed Activities (Effective Immediately), 71 Fed. Reg. 2571 (January 17, 2006) (hereafter "Order")

was incomplete and inaccurate in some respect material to the NRC. More precisely, the Order asserts that Mr. Geisen engaged in deliberate misconduct while doing the following:

(1) concurring on written responses sent to the NRC under oath and affirmation on September 4, October 17, and October 30, 2001, (which responses contained information known by Mr. Geisen to be incomplete and inaccurate); and

(2) preparing and presenting information during internal meetings on October 2 and 10, 2001, and during meetings or teleconferences held with the NRC on October 3, 11, and November 9, 2001, with knowledge that information presented in those meetings was incomplete and inaccurate.

Mr. Geisen responded on February 23, 2006, by requesting a hearing on the Staff's Order and denying the allegations therein.[2]

On January 19, 2006, Mr. Geisen was indicted in the United States District Court for the Northern District of Ohio.[3] The indictment covers issues and facts that are inextricably intertwined with those covered by the Order at issue here. Specifically, the indictment accuses Mr. Geisen of the following:

(1) Count 1: Mr. Geisen violated 18 U.S.C. §§ 1001-02 by knowingly and willfully concealing and covering up, and causing to be concealed and covered up, by tricks, schemes and devices, material facts in a matter within the jurisdiction of the executive branch of the government of the United States. This allegation involves a number of submissions and representations, including the written responses sent to the NRC on September 4, October 17 and 30, and November 1, 2001, and the representations made to the NRC in meetings or teleconferences on October 3 and 11, 2001; and

(2) Counts 2-5: Mr. Geisen violated 18 U.S.C. §§ 1001-02 by knowingly and willfully making and using, and/or causing others to make and use, false writings known to contain materially fraudulent statements on matters within the jurisdiction of the executive branch of the United States government in written responses to the NRC on October 17 and 30, and November 1, 2001.

Mr. Geisen was arraigned on January 27, 2006, and pled not guilty to the charges against him.

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[2] *See* Answer and Demand for an Expedited Hearing *David Geisen, IA-05-052* (February 23, 2006).

[3] *See* Attachment A, *United States v. David Geisen, et al. (3:06CR712)*

All of the representations and submissions at issue in the criminal and NRC proceedings involve almost identical material misrepresentations of the condition of Davis-Besse's reactor vessel head in documents and presentations relied upon by the NRC, and of the nature and findings of previous inspections of the reactor vessel head.

On March 20, 2006, at the request of the Department of Justice, the NRC Staff moved to hold the proceeding in abeyance pending the outcome of the criminal proceeding. On May 19, 2006 the Board issued its order, LBP-06-13 denying the requested delay. The Staff hereby petitions for interlocutory review of the Board Order.

DISCUSSION

I. The Board's Ruling Threatens the Department of Justice's Criminal Prosecution with Immediate and Serious Irreparable Impact

The Commission may, in its discretion, grant interlocutory review of a Board's decision if the party can demonstrate that the issue for which it seeks interlocutory review "threatens the party adversely affected by it with immediate and irreparable impact, which as a practical matter, could not be alleviated through a petition for review of the presiding officer's final decision," or "affects the basic structure of the proceeding in a pervasive or unusual manner." 10 C.F.R. §§ 2.341(f)(2)(i); (f)(2)(ii). The Commission may also take interlocutory review as an exercise of its "inherent authority over agency adjudicatory proceedings." *Duke Energy Corp.* CLI-04-21, 60 NRC 21, 26-27 (2004). *See also Hydro Resources, Inc.*, CLI-99-1, 49 NRC 1, 2 (1999); Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC 18, 20 (1998). The Commission recently accepted interlocutory review of a Board Order granting the Staff motion to hold the proceeding in abeyance in a related case. *See Andrew Siemaszko*, CLI-06-12, slip op, (May 3, 2006). The Staff respectfully submits that this case is appropriate for interlocutory review because the Board's decision threatens the government with immediate and irreparable adverse impact.

This harm is not speculative. If the Board's decision is not reversed and a stay is not

granted, the proceeding will move into discovery. At that point, the damage will have been done. It will be immediate and it will be irreversible. There is no avenue for preventing this particular harm other than extending the stay of this proceeding. In short, this is a question which "must be reviewed now or not at all." *Georgia Power Co., et al.* (Vogtle Electric Generating Plant, Units 1 & 2), CLI-94-5, 39 NRC 190, 193 (1994). In *Georgia Power*, the Licensing Board ordered the Staff to release an investigatory report before an order had been issued. The Staff objected, citing the deliberative process privilege and arguing that the premature release of this information could have a negative effect on the enforcement process. *Id.* at 201. The Commission granted interlocutory review of the Licensing Board's order, noting that "[b]ecause the adverse effect of that release would occur now the alleged harm is immediate." *Id.* at 193. In the instant case, as in *Georgia Power*, the impact of the denial of the Staff's motion to hold the proceeding in abeyance is immediate and irreparable and cannot be alleviated through future review of a final decision of the Licensing Board. Granting this petition for review is the only practical manner of alleviating this concern.

II. The Board Erred in Ruling That the Proceeding Should Not Be Held in Abeyance

The Commission's regulations permit a presiding officer to stay a hearing of an immediately effective order when good cause exists. 10 C.F.R. § 2.202(c)(2)(ii). Determining whether good cause exists requires a balancing of competing interests. *See Oncology Services Corp*., CLI-93-17, 38 NRC 44, 50 (1993). The factors to be considered in balancing these interests are; the reason for the delay, the length of the delay, the affected individual's assertion of his right to a hearing, prejudice to the affected person, and the risk of an erroneous deprivation. *See id.* (citing *Barker v. Wingo*, 407 U.S. 514 (1972); *United States v. Eight Thousand Eight Hundred and Fifty Dollars in United States Currency,* 461 U.S. 555 (1983); and *FDIC v. Mallen,* 486 U.S. 230 (1988)). *See also Siemaszko*, CLI-06-12, slip op. at 4. Examining each of these factors will demonstrate that the Board erred in denying the Staff's motion.

1. Reason for the Delay

In the instant case the NRC Staff moved to hold the proceeding in abeyance at the request of the Department of Justice in order to protect the criminal case against Mr. Geisen. It is well established that a litigant in a civil proceeding should not be allowed to make use of its liberal discovery procedures "as a dodge to avoid the restrictions on criminal discovery and thereby obtain documents he would not otherwise be entitled to for use in his criminal suit." *Campbell v. Eastland*, 307 F.2d 478, 487 (5th Cir. 1962). This dilemma requires a government determination of which case should be tried first. *Id.* "Administrative policy gives priority to the public interest in law enforcement." *Id*. *See also In re Ivan F. Boesky SEC Litig.,* 128 F.R.D. 47, 48-49 (S.D.N.Y. 1989); *Founding Church of Scientology v. Kelley,* 77 F.R.D. 378, 380 (D. DC 1977); *United States v. One 1964 Cadillac Coupe DeVille,* 41 F.R.D. 352, 355 (S.D.N.Y. 1966). Indeed, the Commission recently held in the *Siemaszko* proceeding that the

> decision to pay heed to DOJ's concern about possible prejudice to its criminal prosecution is driven to a considerable extent by our long-established policy- memorialized in a formal Memorandum of Understanding- of deferring to DOJ when it seeks a delay in our enforcement proceedings pending the conclusion of DOJ's own criminal investigations or proceedings. We do not lightly second-guess DOJ's views on whether, and how, premature disclosures might affect its criminal prosecutions.

See Siemaszko, CLI-06-12, slip op. at 9.

In the instant case, Mr. Geisen has been indicted in the Northern District of Ohio for concealing information from the NRC and providing false documents in response to NRC's Bulletin 2001-01.[4] *See* Affidavit of Thomas T. Ballantine, March 20, 2006 at 2, Attachment B. The prosecutors are concerned that Mr. Geisen may use the administrative process to circumvent the more restrictive rules of criminal discovery which carefully balance the rights and obligations of the parties to a criminal case, in recognition of the government's obligation to prove its case beyond a reasonable doubt. The prosecutors expect that an ongoing administrative case would

[4] Mr. Geisen and Mr. Siemaszko are co-defendants.

alter that balance. For instance, witnesses in a criminal case may choose whether to speak with a defendant's representatives, but can be compelled to appear for administrative depositions. *See* Ballantine Aff. at 6. The Board held that the Government had failed to bring forward specific support for its generalized argument that its criminal prosecution will be harmed by denying the delay it seeks. *See* Board Order at 36. This holding constitutes reversible error. The Commission held, in *Siemaszko* that "DOJ's affidavits are, in our judgment, adequate to sustain the Board's conclusion that going forward with our enforcement proceeding, with its attendant discovery opportunities, has the potential to jeopardize the ongoing criminal prosecution." *See Siemaszko*, CLI-06-12, slip op. at 8. By finding here that the DOJ affidavit is insufficient, the Board required DOJ to demonstrate actual harm to the criminal case, rather then the potential for harm, the standard set out by the Commission in *Siemaszko*.

The Commission held, in *Siemaszko,* that:

> the DOJ affidavits demonstrate that the NRC civil enforcement and the DOJ criminal cases are sufficiently intertwined to raise a realistic prospect of prejudice to the criminal prosecution if civil discovery and a civil hearing proceeding prematurely. When issuing the Federal Rules of Criminal Procedure, the Supreme Court (with implicit Congressional approval) prescribed the disclosures necessary for a fair balance between criminal defendants' and prosecutors' interests. We therefore decline to restart our proceeding and, in effect, authorize discovery not contemplated by Federal criminal rules.

See Siemaszko, CLI-06-12, slip op. at 9. Unlike *Siemaszko* it is undisputed in the instant case that the civil enforcement and the DOJ criminal cases are intertwined. *See* David Geisen, Transcript of Pre-Hearing Conference, April 11, 2006 at 64. DOJ had expressed concern about possible prejudice to the criminal proceeding, and the cases are intertwined. This statement by a DOJ prosecutor is sufficient to demonstrate a reason to hold the proceeding in abeyance.

The standard apparently established by the Board's Order - that there must be actual evidence that the defendant will gain an advantage from civil discovery or evidence that the defendant has demonstrated a likelihood of misusing discovery to intimidate witnesses - is a standard without NRC precedent. The potential for witnesses to be less forthcoming and to

potentially shape or alter testimony based on the experience of being deposed does not rely on any misconduct by the defendant, but is a natural outgrowth of the adversarial process. Commission decisions in *Oncology* and *Siemaszko* recognized the need to protect the overall balance created by the criminal justice system. *See Siemaszko*, CLI-06-12, slip op. at 9. ("When issuing the Federal Rules of Criminal Procedure, the Supreme Court (with implicit Congressional approval) prescribed the disclosures necessary for a fair balance between criminal defendants' and prosecutors' interests"). When DOJ has demonstrated that this underlying balance is implicated by the NRC's administrative proceeding because of the close factual links between the two actions, the overall balance in the criminal discovery system is threatened. Since the Staff has demonstrated a compelling reason to hold the proceeding in abeyance the Board committed reversible error by not finding that this factor weighed heavily in favor of the Staff.

2. Length of Delay

The Staff acknowledges that it has asked for a delay of indeterminate length. The Staff concedes that the Commission ruled in *Siemaszko* that the identical indeterminate delay, pending the outcome of the very same criminal trial weighs somewhat against delaying this proceeding further. *See Siemaszko*, CLI-06-12, slip op. at 6. The Staff does note however, that while the length of delay is wholly outside the control of the Staff, it is not wholly outside the control of Mr. Geisen. In marked contrast to his position in this proceeding, Mr. Geisen has not attempted to move the criminal proceeding along quickly, but rather has participated in joint motions to extend discovery and delay the filing of pre-trial motions.

3. Prejudice to Mr. Geisen

The Staff concedes that, unlike the situation in *Siemaszko*, the Order to Mr. Geisen was immediately effective and thus does impose a legally cognizable harm to Mr. Geisen such that he is prejudiced by a delay. However, this harm does not prejudice his ability to mount an adequate

defense. Similarly, as noted above, Mr. Geisen can attempt to move the criminal trial along quickly, thereby reducing any prejudicial delay to a minimum.

4. Assertion of Right to a Hearing

The fourth factor in the *Oncology* balancing test is Mr. Geisen's assertion of the right to a hearing. *Oncology*, 38 NRC at 58. The Staff does not dispute that Mr. Geisen has requested a prompt hearing, but this factor does not weigh greatly in his favor. As the Commission recently reiterated in *Siemaszko* "this factor is, by its nature, merely procedural, and consequently of little importance when balancing real-life equities." *Siemaszko*, CLI-06-12, slip op. Thus, there is no reason to give it any weight in the current balancing test.

5. Risk of Erroneous Deprivation

The final *Oncology* factor is the risk of erroneous deprivation. *Oncology*, 38 NRC at 51. This factor was correctly found by the Board to weigh in the Staff's favor. *See* Board Order at 39. The Board erred, however, in not according this factor more weight in its analysis. Although the Order's immediate effectiveness means that Mr. Geisen is currently barred from employment in the nuclear industry, the risk that this limitation is based in error is not great. As the Commission stated in *Oncology*, "of particular relevance" to assessing the risk of erroneous deprivation is the opportunity the adversely affected party has under 10 C.F.R. § 2.202(c)(2)(i) to challenge the order's immediate effectiveness. *Oncology*, 38 NRC at 57. Here, Mr. Geisen chose to forego this opportunity; thus, this factor weighs in favor of the Staff.

III. Application for Stay Pending Review

Pursuant to 10 C.F.R. § 2.342, the Staff also requests a stay of the effectiveness of the Board Order pending a ruling on the Staff's Petition for Review. Pursuant to this section, in deciding whether to grant a stay, the Commission will consider, (1) whether the moving party has

made a strong showing that it is likely to prevail on the merits; (2) whether the party will be irreparably injured unless a stay is granted; (3) whether the granting of a stay would harm other parties; and (4) where the public interest lies.

For the reasons discussed in the petition for review, the Staff believes it is likely to prevail on the merits. In any case, tribunals may issue stays when there is a difficult legal question and the equities in the case suggest that the status quo should be maintained. *See Washington Metropolitan Area Transit Commission v. Holiday Tours*, 559 F.2d 841, 844-45 (D.C. Cir. 1977).

The Staff will be irreparably injured unless a stay is granted. The Commission has repeatedly held that irreparable injury is the most crucial factor in ruling on stay requests. *See Vermont Yankee Nuclear Power Corp.*(Vermont Yankee Nuclear Power Station), CLI-00-17, 52 NRC 79, 80 (2000); *See also Alabama Power Co.* (Joseph M. Farley Nuclear Plant, Units 1 & 2) CLI-81-27, 14 NRC 795, 797 (1981); *Entergy Nuclear Vermont Yankee* (Vermont Yankee Nuclear Power Station) CLI-06-08, slip op. (2006). A short stay will ensure that the criminal proceeding is not inadvertently jeopardized while the matter is under review by the Commission. Without a stay the Staff must begin to engage in discovery, which will presumably involve answering interrogatories and defending depositions. The Board Order required the Staff to notify the Board and parties by May 25, 2006 when it could comply with its 10 C.F.R. § 2.336 document discovery. *See* Board Order at 41. In response to the Board Order, the Staff stated it could be in the position to produce those documents as early as June 5, 2006.[5] If a short stay is not granted, the harm that the Staff seeks to avoid- responding to civil discovery requests which could adversely affect the criminal proceeding - will begin to occur. The *status quo* will be irreparably altered without the grant of a stay, and thus a stay is justified to preserve the Commission's ability to consider the merits of the Staff motion to hold the proceeding in abeyance. *See Texas Utilities*

[5] The Department of Justice does not object to the Staff serving its initial document disclosures pursuant to 10 C.F.R. § 2.336.

Generating Co. (Comanche Peak Steam Electric Station, Units 1 & 2), CLI-83-6, 17 NRC 333, 334 (1983).

A short stay to allow the Commission to review the matter will not harm Mr. Geisen and is in the public interest. The public interest is served by allowing the Commission to rule on whether or not the enforcement proceeding should be held in abeyance. Mr. Geisen will not be harmed by a short "housekeeping" stay since it will only be of such duration as to allow the Commission to rule on the motion to hold the proceeding in abeyance.

Thus, for the foregoing reasons the Staff submits that a stay pending review is appropriate and necessary in this case.

CONCLUSION

The Staff has demonstrated that it will be irreparably injured if a stay is not granted and the Commission does not accept interlocutory review. The Staff has further shown a compelling reason to delay the proceeding, the need to protect the criminal proceeding. Mr. Geisen cannot demonstrate a countervailing reason that the proceeding should not be delayed. Thus, the Board errred in denying the Staff motion. The Commission should stay the effectiveness of LPB-06-13, accept interlocutory review, and reverse the Board.

Respectfully submitted,

/RA by Sara E. Brock/

Sara E. Brock
Michael A. Spencer
Counsel for NRC Staff

Dated at Rockville, Maryland
this 31st day of May, 2006

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
DAVID GEISEN	)	Docket No. IA-05-052
	)	
	)	ASLBP No. 06-845-01-EA

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S PETITION FOR INTERLOCUTORY REVIEW OF BOARD'S DENIAL OF MOTION TO HOLD THE PROCEEDING IN ABEYANCE AND FOR A STAY PENDING REVIEW" in the above captioned proceeding have been served on the following persons by deposit in the United States Mail; through deposit in the Nuclear Regulatory Commission internal mail system as indicated by an asterisk (*); and by electronic mail as indicated by a double asterisk (**) on this 31st day of May, 2006.

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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. DAVID GEISEN, RODNEY COOK, and ANDREW SIEMASZKO, Defendants.	)	INDICTMENT CASE NO. 3:06CR712 JUDGE JUDGE KATZ Title 18, Sections 1001 and 2, United States Code

The Grand Jury charges:

Introduction

At all times relevant to this Indictment:

1. The Davis-Besse Nuclear Power Station ("Davis-Besse") was a nuclear power plant, located in Oak Harbor, Ohio, in the Northern District of Ohio, operated by the FirstEnergy Nuclear Operating Company, Inc. ("FENOC"), an Ohio Corporation. FENOC held a license to operate Davis-Besse, issued by the Nuclear Regulatory Commission ("NRC").

2. The defendant, DAVID GEISEN, was employed by FENOC as an engineering manager.

3. The defendant, ANDREW SIEMASZKO, was employed by FENOC as a Systems Engineer with responsibility for the reactor coolant system at Davis-Besse.

4. The defendant, RODNEY COOK, was a contractor-consultant employed by FENOC over several years, in part to assist with regulatory compliance matters at Davis-Besse.

5. When operating, Davis-Besse generated energy by using a nuclear chain reaction to heat a solution of water and boric acid, called "reactor coolant," to approximately 600 degrees Fahrenheit. The reactor coolant was contained in a "reactor pressure vessel" and maintained at approximately 2,000 pounds per square inch of pressure. Heat from the reactor coolant was used to make steam to drive turbines that turned electric generators.

6. Davis-Besse's normal operating cycle included outages at approximately two-year intervals, during which the lid to the reactor vessel, called the "reactor vessel head," was removed to allow the removal of spent nuclear fuel rods and the insertion of new fuel rods. The reactor vessel head was removed from the vessel during the 10th refueling outage ("RFO") in 1996, the 11th RFO in 1998, the 12th RFO in 2000, and the 13th RFO in 2002.

7. Operators used control rods to regulate the plant's energy output. When lowered into the reactor core, the control rods absorbed neutrons that would have otherwise sustained the nuclear chain reaction. Control rod drive mechanisms ("CRDM" or "CRDMs") were used to raise and lower the control rods within the reactor core through nozzles that penetrated and were welded to the reactor vessel head. There were sixty-nine nozzles in total, but only sixty-one nozzles had CRDMs attached to them.

8. On August 3, 2001, the NRC issued Bulletin 2001-01, which addressed a problem with CRDM nozzles that could lead to unsafe conditions at pressurized water reactors, like Davis-Besse. The Bulletin explained that the kind of weld used to attach CRDM nozzles to the

reactor vessel head could cause nozzles to crack. It also explained that this problem had been seen in France in the early 1990's and had been found in the United States in December 2000. In 2001, other plants in the United States also discovered cracked CRDM nozzles.

9. Although the NRC and the nuclear industry had considered the impact of nozzle cracks in the early 1990's, the Bulletin noted that recent discoveries had changed the NRC's understanding of the problem for two reasons. First, dangerous circumferential cracks had shown up earlier than expected. Second, the cracks caused only small deposits of boric acid residue on the reactor vessel head, contrary to previous NRC guidance that had suggested that leaking nozzles would produce substantial amounts of boric acid residue. The deposits were left behind when water evaporated from reactor coolant that had leaked onto the head. Small boric acid deposits came to be known as "popcorn" deposits, because of their size and shape. In light of this new information, the NRC Bulletin questioned whether the visual examinations then in use were adequate to detect nozzle cracking.

10. The Bulletin explained NRC expectations regarding future nozzle inspections and required plants to answer questions to help the NRC determine the extent of the nozzle crack problem at reactors in the United States. All facilities holding licenses to operate pressurized water reactors were required to report their nozzle inspection history and plans for future inspections. Facilities deemed to have the highest risk of nozzle cracking–including Davis-Besse–were required to provide detailed information about recent inspections of their reactor vessel heads and a description of anything that impeded those inspections. The highest-risk facilities were also required to report whether they intended to inspect their reactor vessel heads prior to December 31, 2001, and, if not, to provide information demonstrating that continued operation beyond that date would not violate regulatory requirements.

11. The defendants, DAVID GEISEN, ANDREW SIEMASZKO, and RODNEY COOK, together with others known to the grand jury, prepared responses to the Bulletin which were submitted to the NRC on the dates listed below. These responses were part of a scheme to persuade the NRC to agree that Davis-Besse could operate safely after December 31, 2001. The scheme involved making false and misleading statements and concealing material information about both the quality of past reactor vessel head inspections and the condition of the reactor vessel head. Before they were submitted, the responses were forwarded for review and approval to the defendants listed below, among others, and each signed an "NRC Letters Review and Approval Report" (also called a "greensheet") that indicated that he had received and approved the submission:

Date	Title	Signed By
September 4, 2001	Serial Letter 2731, Response to NRC Bulletin 2001-01, "Circumferential Cracking of Reactor Head Penetration Nozzles" ("Serial Letter 2731")	DAVID GEISEN RODNEY COOK
October 17, 2001	Serial Letter 2735, Supplemental Information in Response to NRC Bulletin 2001-01, "Circumferential Cracking of Reactor Head Penetration Nozzles" ("Serial Letter 2735")	DAVID GEISEN ANDREW SIEMASZKO RODNEY COOK
October 30, 2001	Serial Letter 2741, Responses to Requests for Additional Information Concerning NRC Bulletin 2001-01, "Circumferential Cracking of Reactor Pressure Vessel Head Penetration Nozzles" ("Serial Letter 2741")	DAVID GEISEN RODNEY COOK
October 30, 2001	Serial Letter 2744, Submittal of Results of Reactor Pressure Vessel Head Control Rod Drive Mechanism Nozzle Penetration Visual Examinations for the Davis-Besse Nuclear Power Station ("Serial Letter 2744")	DAVID GEISEN RODNEY COOK

Date	Title	Signed By
November 1, 2001	Serial Letter 2745, Transmittal of Davis-Besse Nuclear Power Station Risk Assessment of Control Rod Drive Mechanism Nozzle Cracks ("Serial Letter 2745")	DAVID GEISEN RODNEY COOK

12. Based on the information contained in the Serial Letters, the NRC agreed to FENOC's proposal that it be allowed to operate Davis-Besse beyond December 31, 2001. On December 4, 2001, the NRC sent FENOC a letter agreeing to Davis-Besse's continued operation until February 16, 2002.

13. On February 16, 2002, Davis-Besse shut down for refueling and inspection. On March 8, 2002, the reactor vessel head was discovered to have significant degradation, in the form of a corrosion hole. Subsequent investigation revealed that a crack in nozzle three, at the top of the reactor pressure vessel head, had allowed boric acid to leak onto the head, where it attacked the carbon steel head, causing a six-inch deep corrosion cavity.

14. NRC regulations required its licensees to ensure that information provided to the NRC be complete and accurate in all material respects. Title 10, Code of Federal Regulations, §50.9.

15. These introductory allegations are hereby re-alleged and incorporated by reference in Counts 1 through 5 of this Indictment.

COUNT 1

The Grand Jury charges:

1. From on or about September 4, 2001, through on or about February 16, 2002, in Oak Harbor, Ohio, in the Northern District of Ohio and elsewhere, the defendants, ANDREW SIEMASZKO, DAVID GEISEN, and RODNEY COOK, did knowingly and willfully conceal and cover up, and cause to be concealed and covered up, by tricks, schemes and devices, material facts in a matter within the jurisdiction of the executive branch of the government of the United States, to wit, the condition of Davis-Besse's reactor vessel head, and the nature and findings of previous inspections of the reactor vessel head.

Manner and Means of Scheme

The defendants employed the following tricks, schemes and devices:

2. On or about September 4, 2001, the defendants, ANDREW SIEMASZKO, DAVID GEISEN, and RODNEY COOK, caused Serial Letter 2731 to be forwarded to the NRC. The defendant, ANDREW SIEMASZKO, drafted portions of the Serial Letter, which were reviewed and approved by the defendants, DAVID GEISEN and RODNEY COOK. In Serial Letter 2731, the defendants described reactor vessel nozzle and head inspections, and limitations to accessibility of the bare metal of the reactor vessel head for visual examinations. In so doing, they deliberately omitted critical facts concerning the inspections and limitations on accessibility. In addition, they also falsely stated that the inspections complied with the requirements of Davis-Besse's "Boric Acid Corrosion Control Program."

3. On or about October 3, 2001, the defendants, DAVID GEISEN and RODNEY COOK, and other FENOC employees, held a telephone conference with NRC staff employees to discuss concerns of the staff regarding inspections described in Serial Letter 2731, which were

conducted during the 11th RFO (in 1998) and the 12th RFO (in 2000). During this telephone conference, the defendant, DAVID GEISEN, falsely stated that in 2000 FENOC had conducted a "100% inspection" of the reactor vessel head with the exception of some areas [five or six nozzles] where inspection was precluded because of "flange leakage." In fact, at least twenty-four nozzles were blocked from view because of boric acid.

4. On or about October 11, 2001, in Rockville, Maryland, the defendant, DAVID GEISEN, and others met with Technical Assistants of NRC Commissioners and falsely represented as a "fact" that "[a]ll CRDM penetrations were verified to be free from 'popcorn' type deposits using video recordings from 11RFO or 12RFO."

5. On or about October 16, 2001, the defendant, RODNEY COOK, sought information from Davis-Besse personnel about whether it was true that visual inspections of some nozzles had been done during 11 RFO and 12 RFO, but had not been recorded on videotape. In 11 RFO the entire inspection was recorded on videotape and there were no unrecorded visual inspections. On or about October 17, 2001, the defendants, RODNEY COOK and ANDREW SIEMASZKO, approved Serial Letter 2735 with an attached table that falsely stated that there were 10 nozzles that had satisfactory visual inspections during 11 RFO, such that no video record was required of the nozzles.

6. On or about October 17, 2001, the defendants, ANDREW SIEMASZKO, DAVID GEISEN, and RODNEY COOK, caused Serial Letter 2735 to be forwarded to the NRC. This submission conceded that portions of the reactor vessel head were obscured by boric acid in inspections during the 11th RFO (in 1998) and 12th RFO (in 2000) but falsely represented that in the inspection during the 10th RFO (in 1996) the entire reactor pressure vessel head was inspected. The submission attached a table prepared by the defendant, ANDREW SIEMASZKO,

that falsely stated that the entire reactor pressure vessel head was inspected during the 10th RFO and that the video recording of that inspection was void of head orientation narration.

7. On or about October 24, 2001, in Rockville, Maryland, the defendant, DAVID GEISEN, and other FENOC employees met with NRC staff employees and represented that "all but 4 nozzle penetrations were inspected in 1996," and "[a]ll CRDM penetrations were verified to be free from 'popcorn' type boron deposits using video recordings from 10 RFO, 11RFO or 12RFO," and "[a] review of visual recordings as well as eye-witness accounts served as the means of the inspection."

8. Between on or about October 22, 2001, and October 30, 2001, the defendant, RODNEY COOK, deleted sections of Serial Letter 2741 that he was drafting, which truthfully stated that areas of the reactor pressure vessel head would not be viewable in the upcoming 13 RFO because of "pre-existing boric acid crystal deposits."

9. On or about October 30, 2001, the defendants, DAVID GEISEN and RODNEY COOK, caused Serial Letter 2741 to be forwarded to the NRC. The submission repeated and expanded on representations made in Serial Letters 2731 and 2735, including the representations that inspections were made in accordance with Davis-Besse's Boric Acid Corrosion Control Program, and included representations contained in a table prepared by the defendant, ANDREW SIEMASZKO, that the entire reactor vessel head was inspected during the 10th RFO and that the video of that inspection was void of head orientation narration. Serial Letter 2741 also stated that "[f]ollowing 12RFO, the [reactor pressure vessel] head was cleaned with demineralized water to the extent possible to provide a clean head for evaluating future inspection results."

10. On or about October 30, 2001, the defendants, ANDREW SIEMASZKO, DAVID GEISEN, and RODNEY COOK, caused Serial Letter Number 2744 to be forwarded to the NRC. This submission included photographs taken from the videotapes of the inspections of the reactor vessel head, indicating that the photographs were "representative" of the condition of the reactor vessel head, but which omitted portions of the videos showing substantial deposits of boric acid.

11. On or about November 1, 2001, the defendants, DAVID GEISEN and RODNEY COOK, caused Serial Letter 2745 to be forwarded to the NRC. This submission, entitled "Davis-Besse Nuclear Power Station Risk Assessment of Control Rod Drive Mechanism Nozzle Cracks," expressly relied on false representations about the 1996 head inspection that were previously made in Serial Letters 2735 and 2741. The "risk assessment" contained in this submission used statistical techniques to convince the NRC that allowing Davis-Besse to operate until the Spring of 2002 would pose little risk of damage to the reactor core. The risk assessment was based, in part, on the stated, false assumption that "100% of the CRDM nozzles were inspected with the exception of four nozzles in the center of the head."

12. On or about November 14, 2001, in Rockville, Maryland, the defendants, DAVID GEISEN and ANDREW SIEMASZKO, and other FENOC employees met with NRC staff employees at NRC headquarters to discuss prior head inspections, among other things.

13. On or about November 28, 2001, in Rockville, Maryland, the defendant, DAVID GEISEN, and other FENOC employees made a presentation to the NRC staff to propose a February 16, 2002, shutdown date, and provided statistical information expressly relying on false representations previously made in Serial Letters 2735 and 2741 to argue that the risk of damage to the reactor core was low.

14. On or about November 29, 2001, the defendant, DAVID GEISEN, made a presentation to the FENOC Company Nuclear Review Board ("CNRB"), and falsely represented that a qualified visual inspection was performed in 1996 and that all but four CRDM nozzle penetrations were inspected.

All in violation of Title 18 United States Code, Sections 1001 and 2.

COUNT 2

The Grand Jury further charges:

On or before October 17, 2001, in Oak Harbor, Ohio, in the Northern District of Ohio, and elsewhere, the defendants, ANDREW SIEMASZKO, DAVID GEISEN, and RODNEY COOK, did knowingly and willfully make, use, and cause others to make and use a false writing, that is, a letter to the Nuclear Regulatory Commission identified as Serial Letter 2735, knowing that it contained the following material statements, which were fraudulent in the manners described below, in a matter within the jurisdiction of the executive branch of the government of the United States:

A. "[d]uring 10RFO, 65 of 69 nozzles were viewed," whereas, as the defendants then well knew, significantly fewer than 65 nozzles were viewed;

B. "[i]n 1996, during 10 RFO, the entire RPV head was inspected," whereas, as the defendants then well knew, the entire head had not been inspected during the 10th refueling outage;

C. "[s]ince the [10th refueling outage inspection] video was void of head orientation narration, each specific nozzle view could not be correlated," whereas, as the defendants then well knew, the 10th refueling outage inspection video included head orientation narration;

D. "[t]he inspections performed during the 10th, 11th, and 12th Refueling Outage . . . consisted of a whole head visual inspection of the RPV head in accordance with the DBNPS Boric Acid Control Program," whereas, as the defendants then well knew, areas covered by boric acid had not been inspected, nor had other required steps in the Boric Acid Corrosion Control Program been taken; and

E. "[f]ollowing 12RFO, the RPV head was cleaned with demineralized water to the extent possible to provide a clean head for evaluating future inspection results," whereas, as the defendants then well knew, a substantial layer of boric acid remained, which would impede future inspections.

All in violation of Title 18 United States Code, Sections 1001 and 2.

COUNT 3

The Grand Jury further charges:

On or before October 30, 2001, in the Northern District of Ohio, the defendants, ANDREW SIEMASZKO, DAVID GEISEN, and RODNEY COOK, did knowingly and willfully make, use, and cause others to make and use a false writing, that is, a letter to the Nuclear Regulatory Commission identified as Serial Letter 2741, knowing that it contained the following material statements, which were fraudulent in the manners described below, in a matter within the jurisdiction of the executive branch of the government of the United States:

A. "[d]uring 10RFO, 65 of 69 nozzles were viewed," whereas, as the defendants then well knew, significantly fewer than 65 nozzles were viewed.

B. "[i]n 1996 during 10 RFO, the entire RPV head was inspected," whereas, as the defendants then well knew, the entire reactor vessel head had not been inspected during the 10th refueling outage;

C. "[s]ince the [10th refueling outage inspection] video was void of head orientation narration, each specific nozzle view could not be correlated," whereas, as the defendants then well knew, the 10th refueling outage inspection video included the head orientation narration;

D. "[t]he inspections performed during the 10th, 11th, and 12th Refueling Outage . . . consisted of a whole head visual inspection of the RPV head in accordance with the DBNPS Boric Acid Control Program," whereas, as the defendants then well knew, areas covered by boric acid had not been inspected, nor had other required steps in the Boric Acid Corrosion Control Program been taken; and

E. "[f]ollowing 12RFO, the RPV head was cleaned with demineralized water to the extent possible to provide a clean head for evaluating future inspection results," whereas, as the defendants then well knew, a substantial layer of boric acid remained, which would impede future inspections.

All in violation of Title 18 United States Code, Sections 1001 and 2.

COUNT 4

The Grand Jury further charges:

On or before October 30, 2001, in the Northern District of Ohio, the defendants, ANDREW SIEMASZKO and DAVID GEISEN, did knowingly and willfully make, use, and cause others to make and use a false writing, that is, a letter to the Nuclear Regulatory Commission identified as Serial Letter 2744, knowing that it contained the following material statements, which were fraudulent in the manners described below, in a matter within the jurisdiction of the executive branch of the government of the United States:

A. "[i]n 1996 during 10 RFO, 100% of nozzles were inspected by visual examination," whereas, as the defendants then well knew, significantly fewer than 100 percent of the nozzles were inspected during the 10th refueling outage;

B. "[s]ince the [10th refueling outage inspection] video was void of head orientation narration, each specific nozzle view could not be correlated by nozzle number," whereas, as the defendants then well knew, the 10th refueling outage inspection video included head orientation narration;

C. "[t]he following pictures are representative of the head in the Spring 1996 Outage. The head was relatively clean and afforded a generally good inspection," whereas, as the defendants then well knew, the pictures were not representative, the head was not relatively clean in 1996, and a good inspection was not completed;

D. "[b]ecause of its location on the head, [a pile of boric acid] could not be removed by mechanical cleaning but was verified to not be active or wet and therefore did not pose a threat to the head from a corrosion standpoint," whereas, as the defendants then well knew, no action had been taken in 1996 to verify whether the boric acid was active or wet and, thus, not a corrosion threat;

E "these attached pictures are representative of the condition of the drives and the heads" during the inspection during the 11th refueling outage, whereas, as the defendants then well knew, the referenced pictures were not representative of that inspection; and

F. "[t]he photo for No. 19 depicts in the background the extent of boron buildup on the head and is the reason no credit is taken for being able to visually inspect the remainder of the drives," whereas, as the defendants then well knew, other images

from the 2000 inspection showed that the extent of boron buildup on the head was much greater than what was depicted in the photo of nozzle number 19.

All in violation of Title 18 United States Code, Sections 1001 and 2.

COUNT 5

The Grand Jury further charges:

On or before November 1, 2001, in the Northern District of Ohio, the defendants, RODNEY COOK, ANDREW SIEMASZKO, and DAVID GEISEN, did knowingly and willfully cause others to make and use a false writing, that is, a letter to the Nuclear Regulatory Commission identified as Serial Letter 2745, that contained the following material statements, which were fraudulent in the manners described below, in a matter within the jurisdiction of the executive branch of the government of the United States:

"[d]uring 10RFO, in spring of 1996, the entire head was visible so 100% of the CRDM nozzles were inspected with the exception of four nozzles in the center of the head," whereas, as defendants then well knew, many more than the center four nozzles were not inspected.

All in violation of Title 18 United States Code, Sections 1001 and 2.

Original document -- Signatures on file with the Clerk of Courts, pursuant to the E-Government Act of 2002.

United States v. David Geisen, et al.

A TRUE BILL.

FOREPERSON

GREGORY A. WHITE
UNITED STATES ATTORNEY

March 20, 2006

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
DAVID GEISEN	)	IA-05-052
	)	ASLBP No. 05-839-02-EA
	)	
	)	

AFFIDAVIT OF THOMAS T. BALLANTINE, TRIAL ATTORNEY

1. I am employed by the United States Department of Justice and have served as a Trial Attorney in the Environmental Crimes Section of the Environment and Natural Resources Division since October of 2000. Among my assignments, I am part of a trial team prosecuting employees and a contractor of the FirstEnergy Nuclear Operating Company (FENOC) for concealing material information and presenting false documents to the Nuclear Regulatory Commission (NRC). I submit this affidavit in support of the application of the staff of the NRC to extend a stay of the above-captioned proceeding.

2. On January 19, 2006, a federal grand jury in the Northern District of Ohio returned an Indictment in United States v. David Geisen et al. David Geisen is named as a defendant in all five counts of that Indictment. The Indictment alleges that Mr. Geisen and others concealed material information from the NRC and provided the NRC with false documents in response to NRC's Bulletin 2001-01, which sought information about past inspections of control rod drive mechanism nozzles at FENOC's Davis-Besse Nuclear Power Station and other pressurized water reactors. I understand that the conduct alleged in the Indictment also forms the basis for the above-captioned proceeding.

3. On February 1, 2006, Mr. Geisen was arraigned. The magistrate judge set a

motions date of March 24, 2006. No trial date has been set.

4. "Open-file" discovery has begun and the government expects it will be able to complete most of its discovery obligations in advance of the motions date. These include the obligation to provide: general discovery under Rule 16 of the Federal Rules of Criminal Procedure, exculpatory Brady material (if any), and witness statements under the Jencks Act.

5. I understand that Mr. Geisen is also entitled to discovery in the above-captioned matter, and that such discovery exceeds that which he is entitled under the Federal Rules of Criminal procedure or that which will be produced under "open file" discovery in this case. In particular, I understand that he would be entitled to depose witnesses and to compel answers to interrogatories.

6. The prosecution team in this case believes that the interests of justice would not be served if the criminal and administrative proceedings regarding Mr. Geisen were to go forward in parallel. The prosecutors are concerned that Mr. Geisen may use the administrative process to circumvent the more restrictive rules of criminal discovery. Those rules carefully balance the rights and obligations of the parties to a criminal case, in recognition of the government's obligation to prove its case beyond a reasonable doubt. The prosecutors expect that an ongoing administrative case would alter that balance. For instance, witnesses in a criminal case may choose whether to speak with a defendant's representatives, but can be compelled to appear for administrative depositions. That compulsion alone may be intimidating to witnesses who expect to testify at a criminal trial.

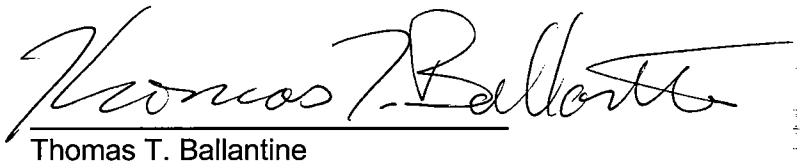
7. In most criminal cases, defendants choose to exercise their privilege against self-incrimination. The prosecution expects that Mr. Geisen would do so in the above-captioned proceeding, which would permit him lopsided discovery advantages in both the criminal case and the administrative case.

8. One of Mr. Geisen's co-defendants, Andrew Siemaszko, has sought a hearing in a related administrative action. The Board in that case is holding Mr. Siemasko's hearing in

abeyance until his criminal case is resolved.

9. For these reasons, the trial team believes that the ends of justice require that they above-captioned proceeding be held in abeyance until the criminal trial is finished. I will inform the NRC staff immediately when a trial date is set.

10. Pursuant to Title 28, United States Code, Section 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.



Thomas T. Ballantine
Trial Attorney
Environmental Crimes Section
United States Department of Justice

3/20/06
Date